

No. 79-140

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS R. FADELL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

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Petitioner contends that there was insufficient evidence to support his convictions for obstruction of justice and perjury, that the government deprived him of the favorable testimony of his co-defendants, and that the government's chief witness committed perjury.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on three counts of obstructing justice, in violation of 18 U.S.C. 1503; two counts of obstructing a criminal investigation, in violation of 18 U.S.C. 1510; and one count of perjury, in violation of 18 U.S.C. 1623.¹ He

¹Petitioner was originally charged in a 16-count indictment. The government withdrew three obstruction of justice counts before the case was submitted to the jury. The jury was unable to reach a verdict on three obstruction of justice counts. The trial court granted judgments of acquittal on three obstruction of justice counts. It also granted a new trial on one perjury count.

was sentenced to three years' imprisonment and fined \$25,000. The court of appeals affirmed (Pet. App. A1-A10).

The evidence at trial showed that petitioner (an attorney and businessman as well as the elected assessor for Calumet Township, Indiana) misused the funds of the Assessor's Office to pay salaries to the employees of his private businesses (Pet. App. A2-A7). Acting on the complaint of one of petitioner's employees, the Internal Revenue Service began an investigation of petitioner in October 1976 (Tr. 226-228). Petitioner learned of this investigation and attempted to obstruct it by coercing his present and former employees to refrain from cooperating with the grand jury or to falsely testify that they worked for the Assessor's Office in return for the money they were paid (Pet. App. A2-A7; Tr. 458-459, 572-573, 577-580, 621-623, 635-645, 796-801, 1053-1066, 2538-2540). The grand jury also investigated whether petitioner had underassessed the value of certain commercial property. The evidence at trial showed that petitioner ordered the records of these valuations (known as "control cards") to be altered, and falsely told the grand jury that he was unaware of any items known as "control cards" (Pet. App. A7; Tr. 653-656, 884-885, 888-889, 894-897, 993, 1014-1016, 1198-1200, 1232-1237, 1350).

1. Petitioner contends (Pet. 11-12, 14-20) that the evidence was insufficient to prove that he obstructed justice and committed perjury. These claims are without merit.

a. Contrary to petitioner's claim (Pet. 19), IRS Agent Sadowski testified that the grand jury's investigation of petitioner began on October 14, 1976 (Tr. 226). Thus, petitioner's assertion (Pet. 11-12) that count X of the indictment is invalid because there was no pending investigation as of April 1, 1977, is in error. Petitioner

interfered with this investigation by making arrangements for John Svaco and the other grand jury witnesses to be represented by the same attorney, who, at petitioner's direction, caused them to invoke their respective privileges against self-incrimination (Pet. App. A5-A6; Tr. 572-573, 577-580, 635-645, 796-801, 2538-2540). See *United States v. Cioffi*, 493 F. 2d 1111, 1119 (2d Cir. 1974).

b. The evidence also showed that petitioner ordered the destruction of the original "control cards" in the Assessor's Office, directed that new cards be fabricated by his staff, and falsely told the grand jury that the Assessor's Office possessed no business records known as "control cards" (Pet. App. A6-A7; Tr. 653-656, 884-885, 888-889, 894-897, 1014-1016, 1198-1200, 1232-1239, 1350). Contrary to petitioner's claim (Pet. 18), this evidence supports his conviction on two counts of obstruction of justice and one count of perjury (counts XIII-XV). Petitioner's presentation of conflicting evidence (Pet. 18) does not detract from the validity of the verdict, for the jury was free to disbelieve his witnesses, and did so in this case.

c. The evidence of petitioner's attempt to prevent other potential witnesses (counts III, IV, X) from cooperating with the investigation did not relate solely to state offenses (Pet. 15-16). That evidence disclosed that petitioner threatened two former employees, Bart Kusmierz and Helen Kravas, in an attempt to insure their silence (Pet. App. A4-A5; Tr. 458-459, 473, 622-623, 1057, 1059-1061). He also arranged, through a single lawyer, for other witnesses with relevant information to invoke Fifth Amendment privileges. Contrary to petitioner's contention, the evidence of his use of funds from the Assessor's Office to pay his own employees was, as the court of appeals recognized (Pet. App. A9-A10), relevant to show

that the employees had information about petitioner's potential criminal tax violations.²

2. Petitioner also argues (Pet. 12-13) that the trial court improperly denied his motion for a continuance that was made on the first day of trial. Petitioner claims that this ruling deprived him of the testimony of his co-defendants, who were severed for separate trial four days prior to petitioner's trial.³ At the time petitioner moved for a continuance, he claimed that his co-defendants would testify on his behalf, but he did not disclose the substance of their testimony (Pet. App. A8; Tr. 3). Given the tardiness of petitioner's request and his failure to substantiate it with specific reasons, the trial court did not abuse its broad discretion in refusing to grant petitioner a continuance. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

3. Finally, petitioner argues (Pet. 13-14) that certain tape recordings show that government witnesses committed perjury. His principal claim is that a tape recording of his conversation with John Svaco on June 6, 1977, demonstrates that petitioner did not realize that the records subpoenaed by the grand jury were known as "control cards." Assuming *arguendo* that this tape (Tr. 2196-2213) is complete and accurate, it still does not aid

²Petitioner's argument (Pet. 17-18) that the only evidence showing his knowledge of the federal investigation was his December 1976 Freedom of Information Act request for his tax file is equally without merit. As the court below noted, petitioner's attempt to have Kusmierz fired and his threat to either sue Kravas civilly or subject her to criminal prosecution also showed his awareness of an investigation (Pet. App. A4-A5).

³The government moved more than two months prior to trial (see Gov't Ct. App. Br. Appendix 1, at 3) to disqualify counsel for petitioner's co-defendants on the ground that they had represented the witnesses in the abortive April 1977 grand jury appearances. The court denied this motion, but after a second hearing two days later it severed the co-defendants on their own motion (see *id.* at Appendix 5, at 5). The indictment against them was later dismissed.

petitioner. It clearly shows his attempt to silence Svaco. Moreover, although the tape indicates that "control cards" were designated by several other names as well, four witnesses, not involved in the taped conversation, testified that the records were indeed generally known as control cards (Tr. 884-885, 888-889, 1198-1199, 1232-1237, 1350).⁴

⁴Petitioner also argues (Pet. 10-11) that the indictment was based solely on the prosecutor's unsworn statements to the grand jury and that no grand jury witnesses implicated petitioner in any crimes. In support of that assertion, petitioner cites a purported admission in the government's brief in the court of appeals. However, the government's brief (Ct. App. Br. 60-64) expressly notes that the indictment was not based on statements from the prosecutor, but rather was based on the testimony of various witnesses including federal investigative agents. *Ibid.* Petitioner's claim of conflict with *Wood v. Georgia*, 370 U.S. 375 (1962), and *United States v. Hodge*, 496 F. 2d 87 (5th Cir. 1974), is therefore unfounded. The fact that the witnesses before the grand jury testified in part on the basis of hearsay information does not invalidate the indictment. *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Bertolotti*, 529 F. 2d 149 (2d Cir. 1975).

Petitioner asserts generally (Pet. 14) that the court of appeals found "false" facts. However, the record supports the factual statements that petitioner challenges (Pet. App. C). The evidence showed that David Krevitz gave a statement to a local newspaper reporter, that this upset petitioner, and that he in turn helped prepare a false counter-affidavit for Krevitz's signature (Pet. App. A4; Tr. 929-936, 939-943, 955-965). Moreover, petitioner attempted to have Bart Kusmierz fired by applying pressure through the Assessor's Office (Pet. App. A4-A5; Tr. 621-623, 1053-1066). Petitioner also called Helen Kravas, who had been employed by petitioner as his legal secretary and then worked for his private companies while receiving a salary from the Assessor's Office (Tr. 446-447). In this conversation, petitioner revealed that he was concerned about the investigation and stated to Kravas that she could be liable either criminally or civilly for her receipt of funds from the Assessor's Office (Pet. App. A5; Tr. 456-459, 473). Petitioner's obstructive actions directed to the grand jury witnesses and his false denial of knowledge of the control cards are

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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discussed on page 3, *supra*. The testimony concerning the State Board of Accounts hearing, as the court of appeals observed (Pet. App. A10), amply demonstrated that petitioner devised the scheme to direct the grand jury witnesses to refuse to testify by raising their privilege against self-incrimination—his chief tactic throughout the investigation (Tr. 627-635, 790-795, 818-820, 918-920, 1317-1318). Finally, Bart Kusmierz testified that he received approximately one-third of his salary from the Assessor's Office, even though he did not work there (Tr. 252-255).